

NASA v. Nelson
--- U.S. --- (2011)
Decided January 19, 2011

FACTS: The petitioners (28) are all employees of the California Institute of Technology (Cal Tech) but working under contract for the Jet Propulsion Laboratory (owned by NASA). Many had worked for JPL for years and had undergone the customary employee background check through the university when hired, but as a result of changes in federal law (HSPD-12) were required in 2004 to undergo the same background check as federal employees in equivalent level positions. (The requirement was made part of the contract between NASA and Cal Tech.)

Shortly before the deadline to have the employee paperwork submitted, the petitioners filed suit. They focused on two parts of the questionnaire, a group of questions which asks the employee about use of illegal drugs and requires disclosure of drug treatment or counseling and another section, which is sent to references, who were asked an open-ended question about the employee's suitability for the position.

The District Court refused to enter an injunction stopping the use of the questions, but the Ninth Circuit Court of Appeals reversed that decision, finding both to be "not narrowly tailored to meet the Government's interests in verifying contractors' identities and ensuring JPL's security." NASA petitioned the U.S. Supreme Court for review and it granted certiorari.

ISSUE: Are questions concerning illegal drug use and open-ended questions concerning suitability valid on employment background checks?

HOLDING: Yes

DISCUSSION: The Court looked to earlier claims concerning violations of "informational privacy." In *Whalen v. Roe*¹, the Court had noted that the disclosure of "private information" to the government "was an 'unpleasant invasion of privacy'" but did point out that the statute did carry with it some security provisions to protect against release of the information to uninvolved parties.

The Court stated that when the government asks such questions, it does so as an employer, and that earlier cases had recognized that in that capacity, the government "has a much freer hand than it does when it brings its sovereign power to bear on citizens at large." The Court did not find their attempt to make their status as contractors, rather than employees, persuasive, as there were no practical differences between their duties and those of actual federal employees and that they had the same access to NASA facilities.

The Court found that the challenged portions of the two questionnaires to be "reasonable, employment-related inquiries that further the Government's interests in managing its internal operations." The questions about drug use were a useful way to determine if the employees are "reliable, law-abiding persons" who will properly discharge their duties. The question about treatment was a way to separate out those users who are "taking steps to address and overcome their problems" - and the process specifically protects the applicants from being reported to

¹ 429 U.S. 589 (1977)

criminal authorities providing they answer truthfully. With respect to the open-ended question, the Court found it to be “reasonably aimed at identifying capable employees who will faithfully conduct the Government’s business.” The use of such questions was, it noted, pervasive in both the public and private sectors.

The Court concluded that the collection of the data, along with the protections in the process, made the process valid and that the “Government’s inquiries do not violate a constitutional right to informational privacy.”

FULL TEXT OF OPINION: <http://www.supremecourt.gov/opinions/10pdf/09-530.pdf>